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No. 95-2074

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1996

CITY OF BOERNE, TEXAS,
Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF
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AMERICAN HOMEOWNERS FOUNDATION,
AMERICAN LAND RIGHTS ASSOCIATION,
AMERICAN LOGGERS SOLIDARITY,
AMERICANS FOR TAX REFORM,
CITIZENS AGAINST REPRESSIVE ZONING,
CITIZENS FOR CONSTITUTIONAL
PROPERTY RIGHTS, INC.,
CITIZENS FOR PRIVATE PROPERTY
RIGHTS, INC.,
COMMITTEE FOR A CONSTRUCTIVE TOMORROW,
CONSERVATIVE CAUCUS, INC.,
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THE HEARTLAND INSTITUTE,
HILL COUNTRY HERITAGE ASSOCIATION,
HILL COUNTRY LANDOWNERS' COALITION,
INDEPENDENCE INSTITUTE,
INDIVIDUAL RIGHTS FOUNDATION,
LAND RIGHTS FOUNDATION,
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NATIONAL CENTER FOR PUBLIC POLICY ANALYSIS,
NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
NEW HAMPSHIRE LANDOWNERS ALLIANCE,
NORTHWEST LEGAL FOUNDATION,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
PEOPLE FOR THE WEST! ACCORD CHAPTER,
PUTTING PEOPLE FIRST,
STOP TAKING OUR PROPERTY (STOP),
TAKE BACK ARKANSAS, INC.,
TEXAS JUSTICE FOUNDATION,
TEXAS PUBLIC POLICY FOUNDATION,
TRANS TEXAS HERITAGE ASSOCIATION,
and UNITED STATES BUSINESS AND INDUSTRIAL
COUNCIL
IN SUPPORT OF RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether the city's inclusion of Saint Peter's Catholic Church within a historic district substantially burdens Respondent's combined right to make reasonable use of private property and to exercise freely religious beliefs?

2. Whether historic preservation is a "compelling" state interest?

3. Whether Petitioner utilized the "least restrictive" means of furthering historic preservation?

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Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* submit this brief in support of Respondent. Consent to the filing of this brief has been granted by counsel for Petitioner and counsel for Respondent, and has been lodged with the Clerk of this Court. Consent has also been granted by counsel for Intervenor-Respondent United States of America, and is submitted along with this brief.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded in 1991 as a non-profit, public interest legal foundation in recognition of the fact that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause meaningless. Defenders' mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights, such as religious liberty. Defenders has

participated in every major case involving property rights before this Court since 1991 including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), and also participated in the Fifth Amendment challenge to the designation of Boyd Theatre as historic in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993), when it was before the Pennsylvania Supreme Court.

Alabama Family Alliance (Birmingham, AL) is a non-profit public policy research and education organization dedicated to the revitalization of American institutions in economics, education, government and the culture.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners.

American Land Rights Association (Battle Ground, WA) is a grassroots coalition of citizens in or near federally managed areas affected by federal land use and regulation.

American Loggers Solidarity (Forks, WA) is a grassroots organization made up of individuals, small businesses, corporations and elected officials in seven states.

Americans For Tax Reform (Washington, DC) is a coalition of individuals, taxpayer groups and businesses concerned with federal tax policy, spending reduction, a balanced budget and restoring accountability to elected officials.

Citizens Against Repressive Zoning (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens For Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees.

Citizens for Private Property Rights, Inc. (Sullivan, MO) is a nonprofit, grassroots organization dedicated to the defense and preservation of property rights.

Committee For A Constructive Tomorrow (Washington, DC) promotes free-market, safe-technological solutions to consumer and environmental concerns.

Conservative Caucus, Inc. (Vienna, VA) seeks to restore the federal government to its constitutional boundaries, eliminate regulations, and preserve America's national independence.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is a group of Texas citizens dedicated to the protection of private property rights.

Environmental Conservation Organization (ECO) (Hollow Rock, TN) represents 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection.

Frontiers of Freedom Institute (Arlington, VA) is a grassroots membership organization founded to promote the Constitution to ensure the maximum freedom for every American.

The Heartland Institute (Palatine, IL) is a nonprofit public policy research organization serving Heartland Members, elected officials, journalists and other opinion leaders.

Hill Country Heritage Association (Lampasas, TX) embraces the conservation of natural resources in conjunction with respect for individual property rights.

Hill Country Landowners' Coalition (Georgetown, TX) was organized in 1991 to oppose over-regulation of private property.

Independence Institute (Golden, CO) is a non-partisan, non-profit public policy organization committed to furthering the goals of freedom and individual opportunity.

Individual Rights Foundation (New York, NY) is a public interest legal organization dedicated to pursuing cases that protect individual liberty and encourage empowerment.

Land Rights Foundation (Gloversville, NY) is an educational organization dedicated to providing information concerning the right to own and enjoy property.

Maine Conservation Rights Institute (Lubec, ME) is dedicated to private property rights and private conservation, through education and research.

National Center for Public Policy Analysis (Dallas, TX) seeks to develop and promote private alternatives to government regulation and control, solving problems by relying on the strengths of the competitive, entrepreneurial private sector.

National Center for Public Policy Research (Washington, DC) promotes innovative free market solutions to environmental problems -- solutions that minimize the sacrifice of American families.

New Hampshire Landowners Alliance (Campton, NH) is a statewide organization founded to foster the conservation of natural resources in a manner consistent with constitutionally guaranteed property rights.

Northwest Legal Foundation (Minot, ND) exists to protect the rights of individuals, especially real property rights, against confiscatory government action.

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate property owners about the threat to their property rights and personal freedom posed by land use regulation.

People for the West! ACCORD Chapter (Phoenix, AZ) is a grassroots organization created to support western communities against the overreaching hand of government.

Putting People First (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature.

Stop Taking Our Property (STOP) (Porter County, IN) is comprised of over 300 families who have been impacted by government policies involving property rights.

Take Back Arkansas, Inc. (Fayetteville, AR) is a private property rights organization whose goal is to organize like-minded people at the grassroots level and provide information about property rights.

Texas Justice Foundation (San Antonio, TX) is a nonprofit, public interest, litigation foundation that protects individual rights, and promotes a better business climate.

Texas Public Policy Foundation (San Antonio, TX) is a research foundation supporting the principles of limited government, free and competitive markets, private property rights, and individual responsibility.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization formed to protect landowners rights whose members own over fifteen million acres of land.

United States Business and Industrial Council (Washington, DC) represents business leaders committed to a prosperous, competitive, and value-centered America.

STATEMENT OF THE CASE

Saint Peter's Catholic Church in the City of Boerne, Texas, was built in 1923 with 230 seats. By 1990, the church building could no longer physically accommodate its rapidly growing congregation of over 2,000 members. Nor could the church comply with recent liturgical changes brought about by Vatican II, such as having the seats arranged around the altar. Therefore, Respondent, the Archbishop of San Antonio, Texas, P.F. Flores, authorized the parish to construct a larger church with a liturgical design that would satisfy both concerns.

Accordingly, in 1993 Respondent submitted a building permit application to the Petitioner, City of Boerne, Texas, seeking permission to enlarge the church facility. However, because in 1991 the Petitioner had promulgated a historic preservation ordinance which established a historic district and included the facade of St. Peter's Church, the Petitioner denied the building permit request. Moreover, in direct response to the Respondent's permit application the Petitioner also arbitrarily included the entire church facility within the historic district thus ensuring that no enlargement (nor any

changes to the structure) of the church building could ever occur without city approval. Notably, the city's original Catholic church, built in the 1860's, has never been deemed historic or included in the historic district by Petitioner.

After lengthy negotiations during which Respondent sought to comply with Petitioner's aesthetic requirements and yet meet the religious needs of the church, Respondent filed the instant lawsuit alleging, *inter alia*, that the city's historic preservation ordinance as applied to the church, violated the Fifth Amendment's Just Compensation Clause and the parishioners' right to the free exercise of religion as protected by the Religious Freedom Restoration Act ("RFRA"). The only substantive issue ruled on by the courts below was the constitutionality of RFRA. The trial court held that RFRA was unconstitutional because it violated the doctrine of separation of powers by intruding upon the judicial branch's power to define constitutional rights. The court below reversed, upholding the constitutionality of RFRA.

SUMMARY OF ARGUMENT

The issue presented for review in this case is whether Congress has the power to enact the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* (1994). The stated purpose of RFRA is to protect "persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). However, because Respondent's right to the free exercise of religion in this case is inherently bound up with the church building itself, the protections afforded to the free exercise of religion are contingent upon the protections provided by the Fifth Amendment rights in private property.

The intersection of religious free exercise and property rights in the context of a church building is unique and results from the fact that a church is a sacred form of property. The notion that a church building is an expression of religious belief has been repeatedly recognized by courts and legal commentators. For example, in *First Covenant Church v. City of Seattle,* 840 P.2d 174 (Wash. 1992), the Washington Supreme Court *en banc* described how a church structure is, in and of itself, an expression of religious beliefs:

> First Covenant claims, and no one disputes, that its church building itself "is an expression of Christian belief and message" and that conveying religious beliefs is part of the building's function....The relationship between theological doctrine and architectural design is well recognized. . . . The exterior and the interior of the structure are inextricably related.

Id. at 182 (citations omitted).[1]

The *First Covenant* Court concluded that a historic designation of the First Covenant Church requiring that the church seek approval of a government body before it could alter the exterior of its house of worship, whether or not the alteration was for a religious purpose, unnecessarily burdened the church members' constitutional right to freely exercise their religious beliefs. *Id.* at 183.

The *First Covenant* Court was especially impressed with the fact that it was the City -- not the church leaders -- which had the ultimate control over whether it would allow any architectural change to the structure of the church: "[I]t is clear that the City reserves the right to oversee and challenge

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[1] *See also* Thomas Pak, Note, *Free Exercise, Free Expression, and Landmark Preservation*, 91 Colum. L. Rev. 1813, 1840-43 (1991); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401, 490-98 (1991).

First Covenant's decisions about what is liturgy and what is a valid religious purpose." *Id.* at 184.

By the same token, the Petitioner in this case likewise holds the ultimate authority to make decisions regarding the structure of Respondent's church, even if Respondent decides (as he has in this case) that such structural changes are necessary for religious purposes. But, since editing the edifice of a church is like editing the Bible or a sermon, the application of a historic preservation ordinance to a church -- however aesthetically pleasing the church building may be -- burdens religious free exercise.

Moreover, since this ordinance concerns a building, the free exercise issue must be analyzed in the context of well-established constitutional principles of property rights protection. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that in order to survive Fifth Amendment scrutiny, an ordinance which affects even ordinary private property (such as a home) must: (1) substantially advance a (2) legitimate governmental purpose. *Id.* at 834.

Applying this intermediate level of scrutiny to the record below in the instant case reveals that there was little or no historical basis -- architectural or otherwise -- for designating the Saint Peter's Catholic Church historic. Rather, the record below suggests that the inclusion of first the facade, then the inclusion of the entire church within the historic district was arbitrary.[2] Thus, it is highly doubtful that Petitioner could meet the heavy burden imposed by this Court in *Nollan* of showing that the designation of the church building " substantially advanced" the stated purpose of the historic preservation ordinance.

However, because the property involved in this case is a church, which is itself an expression of religious beliefs, the standard which must be met to achieve a legitimate government purpose must be higher than that for ordinary

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[2] Excerpts from the deposition of Christopher Turk, Director of Planning & Community Services for the City of Boerne, pp. 25-26:

Q. What was the criteria for establishing the Historic District?
A. This line on the map.
Q. What was the criteria for establishing that line?
A. When the line was drawn, keeping in mind or try to keep in mind where the structures were, but I ended up, to keep it straight as possible. . . .
Q. Now, Mr. Turk, you have told me the steps that were taken so there could be a straight line encompassing the district. What was the reason for having a straight line?
A. I don't have a reason.

property. That is, unless there is a legitimate health and safety threat shown to be addressed by the historic designation, its application to a church cannot be sustained. *See First Covenant*, 840 P.2d at 185, *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996).

Having concluded that the historic designation of the church cannot satisfy the Fifth Amendment's standards, the historic designation of the church cannot satisfy review under RFRA and the free exercise clause of the First Amendment.

ARGUMENT

I. Petitioner's Ordinance Limiting Respondent's Right To Build A New Church On His Property Fails To Comport With The "Essential Nexus" Test Established By This Court In *Nollan*.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that in order for the government to justify any land use regulation which affects property rights, government must show that the regulation "substantially advances" its stated purpose. *Id.* at 834. Absent that relationship or "nexus" between the stated governmental

purpose and the governmental restriction, the "evident constitutional propriety disappears." *Id.* at 837. Or, as Justice Scalia, analogizing to another First Amendment right, put it:

> When that essential nexus is eliminated, the situation becomes the same as if California forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Id. See also Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (holding that "essential nexus" test requires permit conditions be roughly proportional to the impact of proposed activity).

This heightened or intermediate level of scrutiny has been applied elsewhere by lower courts to secular properties and the analysis in those cases is instructive for the case at bar. For example, in *Seawall Associates. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals held that the stated purpose of relieving homelessness

was not served by the local ordinance which prohibited property owners from demolishing, altering or converting single-room occupancy properties and obligated them to restore all units to habitable condition. The ordinance further required them to lease the units at controlled rents for an indefinite period. The Court in *Seawall* held that these ordinances failed to "substantially advance" its putative purpose of relieving homelessness and thus violated the Fifth Amendment. *Id.* at 1068-69.

In *Richardson v. City and County of Honolulu*, 797 F. Supp. 1477 (D. Haw. 1991), the United States District Court for the District of Hawaii held that an ordinance setting a rent ceiling on renegotiated leases for residential condominiums was an unconstitutional taking because it did not "rationally further the goal of reducing the cost of leasehold housing for the people of Hawaii while providing a fair return for lessors." *Id.* at 1496. The court further found that the ordinance did not substantially advance its stated purpose in large part because it was overbroad, regulating not only residential condominiums occupied by lessees, but also a

much larger group of condominiums not occupied by lessees. *Id.* at 1494.

In this case, the stated primary purpose of the City of Boerne Historic Landmark Preservation Ordinance No. 91-05 is:

> To protect, enhance and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's and State's architectural, archeological, cultural, social, economic, ethnic and political history and to develop appropriate settings for such places.

(Cert. Pet. App. at 47a.)

It is difficult to see how the inclusion of the Saint Peter Catholic Church within the historic district helps to further this purpose since the Saint Peter Church itself has not been declared a historic landmark under the ordinance. Additionally, the construction of a new church on the same site would not destroy surrounding buildings, which may or may not be historic landmarks. Therefore, preventing the demolition of the existing Saint Peter's Church will not, either directly or indirectly, preserve a single building deemed a historic landmark by the Petitioner.

In short, there is little to suggest that the inclusion of the Saint Peter's Catholic Church within the historic district is

substantially related to the purpose of historic landmark preservation as is required by this Court in *Nollan*. Therefore, this case could be decided in favor of Respondent without even considering the application of RFRA. Because of the religious nature of Respondent's property, however, RFRA may be applied, and provides an even higher burden for Petitioner to meet in justifying the restrictions on Respondent's property.

II. RFRA Is, In Part, A Property Rights Statute For Churches.

At bottom, whether Respondent's right to free exercise of religion is substantially burdened depends directly upon whether its property rights have been violated. The especially high level of protection that must be afforded to Respondent's property as a church directly reflects its religious nature.

Contrary to Petitioner's suggestion that RFRA is merely an attempt to overrule this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), RFRA in fact protects several constitutional rights simultaneously. In this case specifically,

at issue is the combined right involving the protection of private property and free exercise of religion. As this Court explained in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993), "[i]ndividual freedom finds tangible expression in property rights." In this case, it is the specific individual freedom of religious free exercise which finds tangible expression in property rights.

The plain fact is that a church building is itself an expression of religious belief and not merely a structure within which religious conduct occurs. Thus, and as reflected in RFRA, the validity of the historic designation must survive an even higher standard of scrutiny uniquely appropriate for a church.

Courts considering this issue in the past have held that church building design is a form of religious expression. In *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992), the Washington Supreme Court held that the designation of a church building as a historic landmark violated the church's First Amendment right to free exercise of religion. On facts similar to the present case, the City of Seattle passed the Landmarks Preservation Ordinance, under

which the First Covenant Church was designated as a historic landmark. This designation meant that exterior changes to the church had to be approved by the city's Landmark Preservation Board.

The Washington Supreme Court found that the city could not show a sufficiently compelling interest in regulating the exterior structure of churches to warrant the limitation of First Covenant Church's free exercise rights:

> We hold that the City's interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.

Id. at 185.

In *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996), the United States District Court for the District of Maryland held that the City of Cumberland's refusal to grant a demolition permit for a monastery on historic preservation grounds was a violation of the church's right to free exercise of religion under the First Amendment on the theory that a decision to demolish an existing religious

structure and replace it with another religious structure was an expression of religious faith.

Finally, in *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994), the United States District Court for the District of Columbia held that RFRA prevents a city from, under normal circumstances, interfering with religious activities:

> Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion.

Id. at 546.

It might be argued that *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), provides a contrary view to the holdings in *First Covenant* and *Keeler* regarding city interference with church construction. In *St. Bartholomew*, the Second Circuit found that the application of a historic preservation ordinance to church-owned commercial property did not *per se* violate the First Amendment guarantee of free exercise of religion. *Id.* at 354.

St. Bartholomew, however, can be easily distinguished because the building at issue there was a commercial office building to be built on church-owned property, not a church, or other kind of building intended for religious use. Clearly, a commercial office building, even if located on church property, does not involve religious activity, and consequently does not express religious faith through its design.

Moreover, where compelling interests, such as health and safety, are at stake, this Court has repeatedly upheld some regulations restricting the exercise of fundamental rights. Thus, to the extent that zoning or land use regulations reflect safety and health concerns, then those regulations, even when applied to a church, would pass constitutional muster. *See, e.g., Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1989)(holding that compelling interest test applies to zoning regulations affecting churches). Also, regulations affecting churches would not violate RFRA or constitutional provisions where no liturgical elements are included within the scope of the regulation. For example, normal zoning and building code regulations

pertaining to such concerns as setbacks and parking may still be applied to church buildings under RFRA and the constitution since they do not affect the design or other liturgical elements of the church.

A. The advancement of historic preservation is not a compelling state interest.

RFRA allows the government to substantially burden a person's free exercise of religion only if it furthers a compelling state interest by the least restrictive means. 42 U.S.C. § 2000bb-1(b). While this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) found that landmark preservation represented an legitimate state interest, it did not express the view that it constituted a compelling state interest. "Landmark preservation laws constitute a legitimate use of police power to maintain the aesthetic and cultural features of a community. Such ordinances do not represent efforts by the government to further its interests in the health and safety of its citizens." *First Covenant Church v. City of Seattle*, 787 P.2d 1352,

1361 (Wash. 1990), *vacated on other grounds,* 499 U.S. 901 (1991)(*construing Penn Central*).

Thus, in constitutional terms, there is a hierarchy among purposes for which a government may legitimately act. Greater burdens may be imposed in protecting health and safety concerns and in preventing nuisances. Aesthetic concerns, important as they may be, rank lower in this hierarchy of police power objectives and thus justify only less burdensome regulations. As explained by the court in *First English* upon remand from this Court:

> In *Agins* the public purpose advanced was the interest in preventing premature urbanization . . . . The Supreme Court might have difficulty finding that this public purpose would justify depriving a landowner of "all use" of his property. However, the Supreme Court recognized the public purpose in *First English* is far different -- the preservation of lives and health. It would not be remarkable at all to allow government to deny a private owner "all uses" of his property where there is no use of that property which does not threaten lives and health. So it makes perfect sense to deny compensation for the denial of "all uses" where health and safety are at stake but require compensation for the denial of "all uses" where the land use regulation advances lesser public purposes.

First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 901 (Cal. App. 2d 1989), *cert. denied*, 493 U.S. 1056 (1990).

In this case, lesser concerns are at stake: the preservation of a church facade which is at best a matter of aesthetic concern. While aesthetic concerns may well be legitimate public purposes, they cannot reasonably be represented as issues affecting public health and safety. This purpose does not justify the imposition of the burdens imposed on this church building, nor the infringement of the church member's civil rights.

B. The city's requirement that no demolition of the church occur was not the "least restrictive" means of historic preservation.

The City of Boerne's requirement that no part of Saint Peter's Church be demolished, (J.A. at 39), is not the least restrictive means of achieving the City's historic preservation goals in this case.

As the Petitioner states in its brief, the alleged historical significance of Saint Peter's Church to the City of Boerne is based on its architecture. (Pet'r Br. at 2.) The stated purpose to be achieved by the City's historic landmarks

ordinance is to "protect, enhance and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's . . . architectural . . . history." (Cert. Pet. App. at 47a.) By establishing a historic district, the City seeks to further the aesthetic purpose of preserving the external architecture of buildings. The City was especially concerned with changes to the facades of structures that faced a street within the historic district. (J.A. at 26-29.)

When the historic district was created in 1992 the boundary bisected Saint Peter's Church so that its facade fell within the district, but not the remaining portion of the church. (J.A. at 6, 68.) The front of the Saint Peter's Church has a Spanish mission-style facade with twin bell towers made of stone. Thaddeus Herrick, *Court sides with church to raze sanctuary*, The Houston Chronicle, Jan. 25, 1996, at A26; *Appeals Court Upholds Church's Right to Destroy Historic Sanctuary*, AP, Jan. 24, 1996, *available in* LEXIS, Nexis Library, AP File. The church sits on a hill and is easily seen as one enters the City of Boerne. (Pet'r Br. at 2.) Thus, if anything sets the church apart from other buildings it is because of its bell towers. This is the only rational

explanation for the historic district's boundaries, which included the facade, but not the rest of the church. There is no indication that any other part of the exterior of the Church was considered architecturally significant by the City. Even the City's criteria used to justify inclusion of the church's facade within the historic district, (J.A. at 39), relate to seeing the mission revival architecture of the twin stone bell towers on the hill where the church is located. (Pet'r Br. at 2.)

If there is any architectural significance to the Church's facade, which remains in dispute, (J.A. at 72), the City's requirement that no part of the Saint Peter's Church be demolished is the most restrictive means of achieving the City's goal of architectural preservation in this case, not the least. At a minimum, the least restrictive means would be to preserve the facade of Saint Peter's Church. In fact, Archbishop Flores undertook plans to preserve the facade and hide the enlarged church behind it at additional expense. (*See* J.A. at 7, 8.) However, the City denied the building permit and then expanded the City's historic district in 1994 to include the entire church structure. (J.A. at 70-71.) Prohibiting all external changes to the church is not the least

restrictive means of furthering the architectural purpose of the ordinance or the historic district based on the facts of this case.

CONCLUSION

For all of the foregoing reasons, *amici curiae* urge this Court to affirm the decision below.

Respectfully submitted,

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